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No. 89-229

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

KENNETH T. LYONS and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,
Petitioners,

v.

RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94 and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

PETITIONER'S REPLY MEMORANDUM

Thomas B. Carr
(Counsel of Record)
Scott L. Nelson
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Counsel for Petitioners

PACKARD PRESS, 1025 Connecticut Ave., NW, Suite 905, Washington, DC 20036 (202) 659-9600

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PETITIONERS' REPLY MEMORANDUM

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1. Respondents' contention that the Rhode Island Supreme Court's holding on the decisive issue of falsity was based

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[1] Information concerning petitioner NAGE as required by Rule 28.1 is set forth in the Petition for Certiorari, at p.ii.

solely on state law is manifestly incorrect. In their briefs to the Rhode Island Supreme Court, respondents argued that proof of falsity in a libel action is constitutionally mandated, citing Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.), cert. denied, 108 S.Ct. 200 (1987), and that the constitutional requirement of searching appellate review under Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), extends to the issue of falsity. Further, it is clear that the Rhode Island Supreme Court was convinced that the determination of falsity in this case was governed by constitutional principles, as is revealed by its explicit reliance on Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), as well as by the fact that the court's holding on the falsity issue is immediately preceded by a discussion of its review obligations under Bose, culminating in the observation that,

under Bose, the record must "independently support the assertion that the alleged defamatory material contains a false and defamatory statement of fact." Petn. App. A-10. Moreover, as even respondents acknowledge, the Rhode Island Supreme Court bolstered its finding that the Anderson reprint was not false by citations to this Court's First Amendment rulings in Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971), and Mills v. Alabama, 384 U.S. 214 (1966). The Rhode Island Supreme Court's opinion thus makes clear that in holding that the Anderson reprints were, as a matter of law, not "false," the court perceived itself to be exercising a reviewing function required by the First Amendment and to be affording constitutional protection to respondents' speech. The correctness of the Rhode

Island court's holding thus presents a question of federal constitutional law.

That the Rhode Island court also cited opinions based on Rhode Island common law does not insulate its holding from review by this Court. "[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (emphasis added). The Rhode Island Supreme Court's primary reliance on Bose and Hepps as the basis for its review of the question of falsity renders the court's citation of state-court authority

insufficient to provide an adequate and independent state-law basis for its holding. At the very least, the Rhode Island court's ruling on falsity is "interwoven" with federal constitutional law, and thus may be reviewed by this Court.

2. Respondents' reliance on cases applying federal labor policy to libel actions, such as Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), is misplaced. Unlike the labor dispute in Austin, the labor election in which respondents libeled petitioners did not even implicate federal labor policy, as it involved state and local governmental employees not subject to the NLRA or to Executive Order 11491. In any event, Austin holds only that, where it is applicable, federal labor policy imposes on libel plaintiffs the standards of New York

Times Co. v. Sullivan, 376 U.S. 254 (1964), and that statements of opinion cannot serve as the basis for a libel verdict. 2/ Neither holding bars recovery by petitioners. Petitioners, who are public figures, have never contested the applicability of New York Times, nor have they attempted to win redress for any statements of opinion; rather, they seek recovery of damages resulting from respondents' knowingly false statements of fact concerning the government allegations and investigations of wrongdoing discussed in the Anderson reprints. Even where concerns for free speech are at their highest -- as in the case of press reporting of hotly contested political campaigns -- the First Amendment does not

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2/ The language respondents cite from Austin does not represent the Court's holding, but is merely a quotation from a government official concerning his views on regulation of labor campaigns.

bar imposition of liability for knowing false statements of fact. See, e.g., Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989).

3. Respondents attempt to minimize the significance of the Rhode Island Supreme Court's ruling on the issue of falsity by suggesting that it amounts to little more than a factual finding. But the facts -- as found by the properly instructed jury -- were that respondents' statements would be reasonably understood by the average reader as stating a defamatory falsehood. The Rhode Island court's holding was that, as a matter of law, respondents' republication of Jack Anderson's account of false allegations of wrongdoing made in the course of terminated investigations could not be found false simply because the investigations were ongoing when the article was first written. As

demonstrated in the Petition for Certiorari, this holding is inconsistent with settled principles of libel law, [3] as well as with numerous decisions of other state and federal courts.

Respondents attempt to distinguish only two of those decisions, while ignoring or raising trivial objections to our characterizations of the rest. But even where respondents attempt to address directly the cases cited in the Petition, their efforts to identify genuine distinctions fall short. Respondents purport to distinguish Lyons v. Policemen's

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[3] Respondents contend that the discussion in the Petition of the doctrines of republication and privilege is "irrelevant" and that these issues were not raised below. The relevance of that discussion, as set forth in the Petition, is that the breadth of the lower court's misunderstanding of the meaning of falsity would render these settled doctrines useless and superfluous. The discussion thus bears directly on the correctness of the lower court's ruling on the issue of falsity, which was of course fully litigated and decided below.

Association of the District of Columbia, Civil Action No. 74-441 (D.D.C. Feb. 20, 1976), on the basis of the failure of the defendants in that case to reprint portions of the Anderson article that contained Mr. Lyons' denial of the charges. But this distinction is irrelevant, since the court below did not rely on the inclusion of this material in holding the article to be truthful: under the Rhode Island court's analysis, even the truncated version published in Policemen's Association would have remained "truthful." Respondents also suggest that Policemen's Association is distinguishable because the defendants in that case added to some of their reprints the false statement that they were unaware whether the investigations of Mr. Lyons were ongoing. But the District Court in the Policemen's Association case did not rely on this disclaimer in finding the

reprints false; rather, it explicitly held that other reprints distributed by the defendants without the disclaimer were equally or even more false, because they suggested by omission that the investigations definitely were ongoing. Finally, respondents' statement that the Policemen's Association reprint contained a headline not composed by Jack Anderson does not even amount to a factual distinction, since the same was true of respondents' "EXPOSE" reprint.

Simiarly unavailing is respondents' effort to distinguish Reilly v. Gillen, 176 N.J. Super. 321, 423 A.2d 311 (App. Div. 1980), on the ground that it is not clear that the 23-year-old article reprinted in that case was dated, as was the Anderson reprint distributed by respondents. But there is also no basis for concluding that the article republished in Reilly was not dated, and

the Reilly court's opinion nowhere suggests that its holding depended in any way on whether the article was dated or not. Nor did the court rely on the trivial factual errors in the article as the basis for holding that its republication was false once the charges it described had been dropped. Even more irrelevant is respondents' observation that the Reilly reprint was distributed on the eve of an election, whereas the Anderson reprint was not. While these facts might relate to the relative outrageousness of the misconduct of respondents and the Reilly defendants, they have no logical connection to the issue of whether the reprints distributed in each case were false.

The Rhode Island court's holding that the publication or republication of stale, incomplete and unfair accounts of terminated investigations into discredited

allegations is "truthful" as long as the allegations and investigations were in fact pending at some time in the past is inconsistent with the decisions in Reilly, Policemen's Association, and the other cases cited in the Petition: if the Rhode Island court is correct, these decisions are constitutionally defective. See also Lewisohn v. Dial Press, Inc., 264 A.D. 370, 35 N.Y.S.2d 551 (1942) (distribution of book libelous where post-publication events render account of judicial proceedings "no longer true"). The conflict between the Rhode Island court's ruling and the decisions of other courts that have recognized the falsity of efforts to resurrect and spread outdated charges renders review by certiorari appropriate in this case.

4. Finally, respondents suggest that there is no reason to review the Rhode Island court's application of Bose in

light of this Court's recent decision in Connaughton. Respondents understandably make little effort to defend the Rhode Island Supreme Court's de novo weighing of the evidence with respect to the factual issues of knowlege and falsity, as the court's procedure was plainly at odds with the deference commanded by Connaughton to the jury's inferences and its resolution of evidentiary contradictions. Instead, respondents argue simply that the Rhode Island court's error may be overlooked because the Court has so recently visited the issue of the scope of Bose review.

Were the Bose/Connaughton issue the only one raised by the case, respondents' argument might have some force. But the Rhode Island Supreme Court's misapplication of Bose was intertwined with and compounded the error in its ruling on the question of falsity, which is, as we have demonstrated, an issue of constitutional

import with respect to which the Rhode Island court's ruling has worked a significant distortion of libel principles and created a conflict with the decisions of other courts. Viewed in conjunction with the falsity question, the court's misapplication of Bose presents an additional reason for allowing the writ.

For the foregoing reasons, as well as those set forth in the Petition itself, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS B. CARR
SCOTT L. NELSON
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Washington, D.C. 20037

Counsel for Petitioners.